NO. 03-21-00161-CV

IN THE THIRD COURT OF APPEALS
AUSTIN, TEXAS

OFFICE OF THE ATTORNEY GENERAL,

APPELLANT,

V.

JAMES BLAKE BRICKMAN, J. MARK PENLEY, DAVID MAXWELL, AND RYAN M. VASSAR,

APPELLEES

APPEAL FROM CAUSE NO. D-1-GN-20-006861,
IN THE 250TH COURT TRAVIS, COUNTY, TEXAS,
THE HONORABLE AMY CLARK MEACHUM PRESIDING

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STATEMENT OF THE CASE

Appellees are dissatisfied with OAG's misleading Statement of the Case.

Nature of the Case:	Appellees sued OAG not just for reinstatement, but for all relief available to them under Chapter 554 of the Government Code because OAG retaliated against them after they made good-faith reports to law enforcement of Ken Paxton's and OAG's criminal conduct. CR.439. Their reports to the FBI and other law enforcement officials were based not on mere disagreements with legal positions, but on personal observations that Ken Paxton and OAG were committing state and federal crimes. CR.384-410.
Course of Proceedings:	Rather than filing a traditional plea to the jurisdiction, on which evidence might be discovered and admitted, OAG moved to dismiss the case under Rule 91a. CR.194. OAG refused to participate in any discovery and insisted that its Rule 91a motion must be heard and decided solely on the basis of the pleadings. 2.RR 81-82. Appellees and the trial court expressly agreed that the Rule 91a motion would be argued, submitted, and decided without evidence. 2.RR 76-85.
Trial Court's Disposition:	After several hours of argument and taking the Rule 91a motion under advisement, the trial court denied it. CR.648.

STATEMENT REGARDING ORAL ARGUMENT

OAG exaggerates the novelty of this appeal. The dispositive legal issues are common to most whistleblower cases. Here, they are presented under Rule 91a, which requires the Court only to measure Appellees' Second Amended Petition[1] against the express waiver of immunity in Government Code section 554.0035. Especially considering the delay OAG has already caused with its ill-conceived

[1] All references in this brief to the "Petition" refer to the Second Amended Petition.

mandamus petition and first appeal, the Court should determine this accelerated appeal without hearing oral argument. But if the Court decides to hear argument, Appellees request that it be set as soon as possible, and they will participate.

ISSUES PRESENTED

Appellees are dissatisfied with OAG's argumentative statement of the Issues Presented. The only issue is whether the trial court correctly determined that Appellees have pled claims that fall within the Whistleblower Act's express waiver of sovereign immunity. The answer to this question is YES.

OAG's Rule 91a motion and Appellant's Brief raise the following sub-issues, the answer to each of which is NO:

1. Whether the Legislature intended there to be an exception to the protections available to public employees under the Whistleblower Act when an elected official participated in the reported criminal conduct?

2. Whether this Court should consider evidence from a separate hearing in an appeal from the denial of a motion to dismiss under Rule 91a, which was argued, submitted, and decided solely on the basis of the pleadings?

3. Whether OAG has accurately characterized Appellees' Second Amended Petition as alleging that they reported only potential future violations of the law?

4. Whether the Federal Bureau of Investigations, the Texas Rangers, and the Travis County District Attorney's Office all fail to qualify as an "appropriate law enforcement authority" under Government Code section 554.002?

INTRODUCTION

Appellees invoked the protection of the Texas Whistleblower Act because OAG promptly fired them after they informed law enforcement of what they believed in good faith to be criminal conduct by Ken Paxton and the agency. Now OAG—the very agency charged with defending our laws—asks this Court to read a massive, unwritten exception into the Act and hold that the Legislature did not intend for it to apply if an elected official participated in the reported crime. This would rob the Act of its purposes: protecting public employees who inform proper authorities of legal violations and securing compliance with the law by those who direct and conduct governmental affairs. The Court should reject OAG's unprecedented argument and affirm the trial court's ruling.

STATEMENT OF FACTS

Appellees are dissatisfied with OAG's statement of facts because it is argumentative, cites evidence that has no place in this appeal, and mischaracterizes both Appellees' allegations and the proceedings below. For example, OAG's brief repeats the falsehood that Appellees and the other whistleblowers merely "disagreed with certain legal positions" taken by OAG and were fired or forced to resign merely because there was a "precipitous decline of the trust relationship." OAG Br. at xii, 4-5. OAG's alternative facts are improper and demonstrably false.

Because this is an appeal from the trial court's ruling on OAG's Rule 91a motion, the only facts that matter are the facts alleged in Appellees' Second Amended Petition, which this Court must take as true. CR.377; *Koenig v. Blaylock*, 497 S.W.3d 595, 599 (Tex. App.—Austin 2016, pet. denied). Appellees' Petition says nothing about mere disagreements with OAG's legal positions or declining trust. Rather, the pleading alleges in detail that Appellees observed what they believed in good faith to be *criminal* conduct by Ken Paxton and OAG (CR.387-406); they reported this conduct to the Texas Rangers, FBI, and Travis County District Attorney's Office (CR.406-10); and then OAG unlawfully retaliated against them in violation of Government Code Chapter 554 (CR.411-27).

I. Appellees are distinguished public servants who were senior-level OAG employees.

Appellee James Blake Brickman was the Deputy Attorney General for Policy & Strategic Initiatives until OAG wrongfully terminated him on October 20, 2020. Brickman is a lawyer and veteran public servant. Before Ken Paxton recruited him to OAG, Brickman served as the Chief of Staff for the Governor of Kentucky for four years. Earlier in his career, he served as Chief of Staff to a United States Senator, an attorney in private practice, and as a federal law clerk to Amul R. Thapar (now a judge on the Court of Appeals for the Sixth Circuit). CR.379-80.

Appellee David Maxwell is a law enforcement professional. Until OAG wrongfully terminated him on November 2, 2020, Maxwell served as the Deputy

Director, and then Director, of OAG's Law Enforcement Division for approximately 10 years, collectively, where he oversaw 350 employees. Maxwell's storied 48-year career in law enforcement includes over 38 years with the Texas Department of Public Safety—24 as a Texas Ranger. Maxwell has been involved in investigating some of the most serious criminal matters in this State for decades and has a well-earned reputation as an honest, thorough, and tough law enforcement officer. CR.380.

Appellee J. Mark Penley was the Deputy Attorney General for Criminal Justice at OAG until OAG wrongfully terminated him on November 2, 2020. He supervised the Criminal Prosecutions, Special Prosecutions, Criminal Appeals, and Crime Victims Services Divisions, which were comprised of approximately 220 employees. Penley has 36 years of legal experience and is a retired federal prosecutor. CR.380.

Appellee Ryan M. Vassar was OAG's Deputy Attorney General for Legal Counsel until OAG wrongfully terminated him on November 17, 2020. In that role, Vassar served as the chief legal officer for OAG. He represented the Texas OAG before other state and federal governmental bodies and oversaw 60 attorneys and 30 professional staff across 5 different divisions, which are responsible for rendering approximately 50,000 legal decisions each year. Vassar served in different roles at

OAG for over 5 years. Before joining OAG, Vassar served as a law clerk for three years at the Supreme Court of Texas. CR.380-81.

II. Appellees witnessed misconduct and formed a good-faith belief that Ken Paxton and OAG were engaged in criminal behavior.

The Second Amended Petition describes in detail the unusual relationship between Paxton and maligned Austin real estate investor Nate Paul, including allegations that Paul remodeled Paxton's residence and employed Paxton's mistress as well as descriptions of Paxton's overt use of his office to benefit Paul and harm his civil adversaries. CR.384-403. The Petition specifically alleges that Paxton "abused his office by causing the full weight of the office that he commands, deploying employees and resources of OAG spanning multiple functions and departments, to improperly interfere in the civil disputes and criminal matters of his donor, friend and personal benefactor Nate Paul." CR.387. This unlawful conduct commenced in late 2019 and continued throughout 2020. CR.388.

First, Paxton intervened in a series of Open Records requests to help Paul. CR.388-91. Appellees have alleged facts showing that this activity was not a legitimate exercise of the Attorney General's discretion. State and federal law enforcement authorities raided Paul's businesses in August 2019. CR.384. Paul then served Open Records requests on the Texas State Securities Board and the Texas Department of Public Safety, seeking records related to the raid and the ongoing investigation of Paul and his companies. CR.388-89. He also sought an

unredacted version of the FBI's brief opposing the release of records related to the ongoing criminal investigation of him. CR.389.

Ample precedent dictated that Paul's requests be denied; otherwise, the pending law-enforcement investigation would be jeopardized as would years of OAG precedent applying the exception to the Public Information Act for records related to ongoing criminal investigations. CR.389-90. Yet, Paxton—who had never personally involved himself in any of the 30,000-40,000 Open Records decisions OAG issues each year—intervened to help his friend/donor/benefactor. CR.389-90. Paxton personally spoke to Paul about the subject matter; told Vassar that he did not want to assist the FBI or DPS; took personal possession for several days of files that OAG could not *officially* release to Paul; and specifically directed the release of the FBI's unredacted brief to Paul. CR.387-90. There was no legitimate agency rationale for this conduct, and Appellees ultimately came to believe that it was part of a long-running, illegal effort to misuse OAG resources to benefit Nate Paul. CR.390-91; TEX. PENAL CODE §39.02.

Next, Paxton abused his office by deploying OAG resources to assist Paul in a lawsuit *against* a charitable organization. CR.391-93. An Austin charity sued some of Paul's companies and ultimately alleged that those companies breached a settlement agreement requiring them to pay millions of dollars to the charity. CR.391-93. OAG has the statutory power to intervene in litigation involving

charities, but only "[f]or and on behalf of the interest of the general public of this state in charitable trusts." TEX. PROP. CODE § 123.002. OAG's Charitable Trusts Division appropriately declined to intervene in the suit involving Paul's companies because the charity was acting as plaintiff and was represented by capable counsel. CR.391-92.

But Paxton, who had never before taken a personal interest in such a case, overrode the decision of the Charitable Trusts Division and the advice of Appellee Brickman, and expended OAG resources to intervene in the case. CR.391-93. However, Paxton required OAG resources to be used not "on behalf of the interest of the general public of this state in charitable trusts," as required by statute, but instead *against* the charity for Paul's benefit. CR.393. There was no legitimate agency rationale for this conduct, and Appellees ultimately came to believe that it was another part of Paxton's illegal effort to misuse OAG resources to benefit Paul. CR.393; TEX. PENAL CODE §39.02.

Paxton also expended OAG resources—over a weekend—to issue a legal opinion that benefited Paul, even though the opinion was inconsistent with the position OAG had previously taken on the subject. CR.393-94. Appellees have alleged facts showing that this conduct was likewise illegitimate and intended for the unlawful benefit of Paul.

On Friday, July 31, 2020, Paxton asked Ryan Bangert (who later became a whistleblower) to analyze whether foreclosure sales should be permitted to go forward during the COVID-19 pandemic, which of course had by then been raging for many months. CR.393. Bangert solicited assistance from Vassar. CR.393. The analysis was not complicated, as OAG had already determined that various activities could proceed, including indoor activities with greater crowds than outdoor foreclosure sales typically attract.

But Paxton demanded that Bangert and Vassar draft an opinion *prohibiting* foreclosure sales and forced them to rush the decision to publication at 2:00AM on the morning of Sunday, August 2[2]. CR.393-94. Unknown to Appellees at the time, at least one of Paul's properties was scheduled to be sold at a foreclosure sale that same week—on Tuesday, August 4. CR.394. Paul's lawyers successfully utilized the OAG opinion to prevent the foreclosure. CR.394. There was no legitimate agency rationale for this weekend rush to prohibit foreclosure sales, and Appellees

[2] Ken Paxton's public opposition to public health measures in other instances throughout the State during the COVID-19 pandemic are well-known, became the subject of high-profile litigation, and fly directly in the face of what he engineered the OAG's office to do for Nate Paul. *See e.g., State v. El Paso County,* 618 S.W.3d 812, 814-15, 818 (Tex. App.—El Paso 2020, no pet.) (OAG challenged El Paso County order responding to "a dramatic upswing in the COVID-19 pandemic"); *,"); State v. City of Austin*, NO. 03-20-00619-CV, 2021 WL 1313349, *1 (Tex. App.—Austin Apr. 8, 2021, no pet.) (OAG sought to stop local officials' order from "temporarily suspend[ing] dine-in food and beverage service from 10:30 p.m. to 6:30 a.m." during New Year's weekend).

ultimately came to believe that it was another part of Paxton's illegal effort to misuse OAG resources to benefit Nate Paul. CR.393; TEX. PENAL CODE §39.02.

Paxton also spent an extraordinary amount of OAG time and effort to assist Nate Paul's pursuit of "creative" claims that Paul's state and federal law-enforcement troubles were the product of wrongdoing by the FBI, a respected federal magistrate judge, the DPS, and the U.S. Attorney's office. CR.394-403. Here again, Appellees have alleged facts showing that Paxton caused OAG to engage in unlawful conduct for Paul's benefit.

While such allegations would ordinarily be investigated by the Travis County District Attorney's office, Paxton arranged for Paul's allegations to be referred to OAG. CR.394-95. Appellees Maxwell and Penley investigated the allegations and found no basis to support them. CR.395-96. Unsatisfied with this news, Paxton enlisted Vassar's help to initiate the process of retaining outside counsel to perform the investigation at OAG expense instead of using the internal experience and qualifications brought by Maxwell and Penley. CR.397.

But Paxton circumvented longstanding procedures for approving outside counsel contracts and personally committed OAG money to a contract with Brandon Cammack, a five-year lawyer with no law-enforcement or investigative experience. CR.396-400. At Paxton's direction, Cammack falsely held himself out as an OAG "special prosecutor," and obtained grand jury subpoenas under false pretenses to be

served on Nate Paul's adversaries. CR.400. At Paxton's and OAG's direction, Cammack improperly obtained 39 subpoenas from the Travis County Grand Jury by untruthfully claiming he was a 'Special Prosecutor' authorized to represent OAG before the Grand Jury." CR.401.

When Appellees learned that Paxton had secretly hired Cammack without following OAG's procedures and that Paxton was causing OAG to use the grand jury process and subpoenas obtained under false pretenses to investigate and intimidate Nate Paul's adversaries, they finally began to connect all of the dots. CR.402-03. As summarized above and alleged in detail in the Second Amended Petition, each Appellee witnessed part of the misconduct, but none witnessed all of it. They met with each other and other senior OAG staff members, and after realizing the breadth of the wrongdoing, they each formed the good-faith belief that Paxton's efforts to benefit Paul extended beyond mere abuse of office to include bribery, tampering with government records, obstruction of justice, and harassment, in violation of Texas and federal criminal laws. CR.404-06.

III. Appellees each complained to proper law enforcement authorities.

In late September, Maxwell complained to the Texas Rangers about unlawful conduct at the OAG. CR.409. He also reported the unlawful conduct to the FBI and then later to the Travis County District Attorney's Office. CR.408. Around the same time, Brickman, Penley, and Vassar, together with four other deputy attorneys

general who are not parties to this lawsuit, reported unlawful conduct at the OAG to the FBI. CR.407. The whistleblowers spent several hours with two FBI agents telling what they had observed, answering questions, and discussing reasonable inferences they could draw. CR.407. Maxwell did the same thing on his own. CR.408.

Because the conduct they complained of remains the subject of ongoing investigations, Appellees limited the details in their original petition. CR.5. When OAG complained about the "vagueness" of the pleadings, Appellees amended their 127-page (including exhibits) petition on February 10, 2021, including detailed references to specific criminal offenses. CR.404-06. Specifically, paragraphs 87-92 identify by name and legal citation the specific criminal conduct that warranted investigation by law enforcement and that Appellees believe could likely result in formal charges being filed under either federal or state law. CR.404-06. Appellees alleged that Paxton abused the office of Attorney General and violated Texas Penal Code sections 39.02, 37.10, and 36.02, as well as 18 U.S.C. §1510(a), 18 U.S.C. §1512(c)(2), 18 U.S.C. §1512(d), 18 U.S.C. §1344, 18 U.S.C. §1956, and 18 U.S.C. 1961&1962. *Id*.

On October 1, 2020, the seven attorney whistleblowers, including three of the Appellees, signed a letter to the OAG Director of Human Resources notifying OAG of their reports to law enforcement and documenting that they had raised concerns

directly to Ken Paxton. CR.410. Maxwell did not sign the October 1 letter because he was out of state on vacation at the time the letter was drafted, but he agreed with the letter and separately wrote about his whistleblowing concerns to OAG. CR.411.

IV. OAG immediately retaliated.

OAG and Paxton retaliated swiftly. CR.411. Jeff Mateer, then the First Assistant, resigned as a result of his concerns about the unlawful conduct at the OAG, and Paxton replaced Mateer with Brent Webster. CR.411, 416. OAG placed Maxwell and Penley on "investigative leave" on October 2—one day after the letter—but OAG never explained why they were allegedly being investigated. CR.411-12. A month later, Webster interrogated Maxwell and Penley under the guise of an investigative interview, but it was apparent that Webster was interested only in their reports to law enforcement about the misconduct at OAG. CR.424–25. OAG terminated them the same day. CR.425.

Simultaneously, OAG and Paxton issued repeated press statements intended to smear the Appellees. CR. 412-15; 427. Primarily through new First Assistant Webster, OAG demeaned, undermined, and intimidated Brickman and Vassar while they remained in the office. CR.416-19. On October 19, OAG placed Vassar on "investigative leave" and had him escorted out of the building by an armed officer. CR.419. The next day, OAG wrongfully fired Brickman, and on November 17, after another round of pointless harassment, OAG wrongfully fired Vassar. CR.419, 420.

Within about seven weeks, OAG had run off all eight of the professionals who reported OAG's unlawful activities to law enforcement. CR.420. The swiftness of their firings invokes the statutory presumption that OAG's actions against Appellees violated the Whistleblower Act. TEX. GOV'T CODE § 554.004.

V. Appellees filed this suit against OAG.

On November 12, 2020, Appellees filed this suit asserting one cause of action against their public employer: a violation of the Texas Whistleblower Act. CR.5; *See* TEX. GOV'T CODE Ch. 554. In response to OAG's pleadings, to include additional facts that had occurred since the filing of the lawsuit, and to seek temporary injunctive relief on behalf of Appellees who remained unemployed, Appellees amended their petition on December 17, 2020. CR.50.

Appellees filed the live pleading—the Second Amended Petition—on February 10, 2021, in response to OAG's Rule 91a Motion and some of the positions OAG has taken in this lawsuit. CR.377. Although OAG pretends that Appellees' only objective is reinstatement to their former positions, they seek all remedies that the Legislature provided in Government Code section 554.003. CR.427-28, 438.

VI. OAG chose not to file a traditional plea to the jurisdiction but rather a Rule 91a motion to avoid having to provide evidence and discovery.

In response to the suit, OAG hired private counsel and challenged jurisdiction solely under Rule 91a. CR.194. Although fees are usually shifted under Rule 91a in private civil disputes, a Rule 91a motion cannot result in an award of fees and

costs "for or against" a public entity. TEX. R. CIV. P. 91a.7. The only reason for a governmental entity to file under Rule 91a, as opposed to a traditional plea to the jurisdiction, is to prevent discovery from taking place.

Indeed, based on its position that analysis of a jurisdictional plea under Rule 91a does not require the examination of evidence, OAG refused to produce a single document in discovery or answer requests for disclosure and quashed all deposition notices for Ken Paxton, Brent Webster, Brandon Cammack, Laura Olson, and Nate Paul. CR.140; 230. OAG also refused to bring witnesses to the temporary injunction hearing. CR.510.

VII. The trial court denied the Rule 91a motion.

OAG was so worried about evidence that might be offered at the TI hearing, that it repeatedly re-set its Rule 91a motion for hearing on a separate day, before Appellees' setting on the TI. Appellees were forced to move the trial court to consolidate the hearings, as is customary in Travis County. CR.286. The trial court agreed and set the Rule 91a motion for hearing on February 16, 2021, with the TI hearing to follow immediately afterwards, if necessary. CR.331, 332.

After a delay due to Winter Storm Uri, the hearings commenced March 1. The trial court heard extensive argument on the Rule 91a motion and took it under advisement. 2.RR 128. OAG immediately filed a notice of appeal, falsely representing that it was appealing the "denial of OAG's plea to the jurisdiction."

CR.616. Because the trial court had not ruled on the Rule 91a motion, it commenced the TI hearing. 2.RR 131-32. Unfortunately, OAG's misrepresentation that the trial court had denied its Rule 91a motion induced this Court to issue a stay later that night. CR.626. Eleven days later, this Court lifted the stay, denied OAG's mandamus petition, and dismissed its appeal for lack of jurisdiction. CR.642, 643.

But OAG had accomplished its mission. The eleven-day stay gave the trial court ample opportunity to reflect on the Rule 91a motion, and the court denied it before resuming the TI hearing. CR.648. OAG promptly noticed this appeal, invoking the automatic stay and preventing Appellees from obtaining temporary injunctive relief. CR.651.

SUMMARY OF ARGUMENT

OAG's appeal is premised on a warped sense of loyalty. Appellees did not owe a such an absolute duty of personal loyalty to Ken Paxton that he qualifies for an unwritten exception to the Texas Whistleblower Act. Rather, their report of Paxton's corrupt activities was a statutorily protected act of loyalty to the people of Texas. If this Court were to accept OAG's unprecedented arguments, it would strip the Act of its most vital functions: protecting public employees who inform proper authorities of legal violations and securing governmental compliance with the law by those who direct and conduct governmental affairs.

The Court should disregard OAG's citations to the partial Reporters' Record that was created during the aborted temporary injunction hearing. Not only are the citations badly misleading, but OAG asserted its jurisdictional challenge under Texas Rule of Civil Procedure 91a so it could block all discovery and prevent the TI hearing from being completed. Following the express terms of this rule, the trial court heard OAG's motion without admitting evidence and based its ruling solely on Appellees' Second Amended Petition. This Court's de novo review is likewise confined to the sufficiency of the pleading.

And the pleading overwhelmingly supports the trial court's ruling. The Whistleblower Act protects public employees who report unlawful conduct of the employing governmental entity *or* another public employee. Ken Paxton's corruption constitutes both. His actions are the actions of OAG as a matter of law because he committed them in his official capacity as OAG's head policy maker. Paxton is also a state employee who cashes a taxpayer paycheck just like Appellees did until OAG unlawfully fired them.

The Second Amended Petition alleges in detail every element required to invoke the express waiver of sovereign immunity in Government Code section 554.0035. Appellees' experience as lawyers and law enforcement professionals assisted them in deducing the connections between multiple instances of Ken Paxton's misconduct, and the pleading shows that they reported every element of

multiple crimes to appropriate law enforcement authorities. OAG's repeated attempt to recharacterize the pleading as alleging no more than disagreements with Paxton's policies or the mere possibility of future crimes is improper and unsupported. And there is no additional requirement that they allege a "unique" or "secret" fact that each Appellee reported to law enforcement. The Court should reject OAG's unsupported invitations to draft requirements into the Whistleblower Act that the Legislature did not see fit to include in the statutory text.

Last, and certainly least, the Court should dispense with OAG's professed constitutional "concerns" over the implications of holding Ken Paxton to the laws that govern the behavior of every other person entrusted with the mantle of government power in this state. The Whistleblower Act does not infringe the Attorney General's discretion to terminate employees who are not on board with his policies; it merely prohibits what happened here—retaliation for good-faith reports that the Attorney General violated the law.

STANDARD OF REVIEW

OAG advocates the wrong standard of review. After filing its jurisdictional challenge under Rule 91a and preventing the discovery or admission of evidence in connection with the motion, OAG now seeks to invoke the standard of review applicable to evidence-based pleas to the jurisdiction. OAG Br. at 10. In fact, OAG urges the Court to consider evidence that was admitted during the partial *temporary*

injunction hearing after the trial court heard the Rule 91a motion and took it under advisement. Although this evidence ultimately supports Appellees' position, the Court should not consider it.

Rule 91a unequivocally provides: "the court may not consider evidence in ruling on the motion and must decide the motion based solely on the pleading of the cause of action, together with any pleading exhibits permitted by Rule 59." TEX. R. CIV. P. 91a6. Accordingly, "the scope of this Court's review of the trial court's Rule 91a dismissal is limited to the pleading and any Rule 59 pleading exhibits." *Zawislak v. Moskow*, No. 03-18-00280-CV, 2019 WL 2202209, at *4 (Tex. App.—Austin May 22, 2019, no pet.).

OAG's jurisdictional challenge under Rule 91a is governed by the same standard. "The trial court may not consider evidence in ruling on the motion," and "[w]e therefore review the trial court's order using the standard of review for pleas to the jurisdiction that challenge only the pleadings." *City of Austin v. Liberty Mut. Ins.*, 431 S.W.3d 817, 822, 823 n.1 (Tex. App.—Austin 2014, no pet.) (citing *Texas Dep't of Parks & Wildlife v. Miranda,* 133 S.W.3d 217, 226 (Tex. 2004).[3]

The correct standard is a de novo review favoring Appellees:

> When, as here, a plea to the jurisdiction challenges only the pleadings, we determine whether the pleader has

[3] OAG itself cited *Liberty Mutual* during the hearing on its Rule 91a motion for the proposition that "a 91a plea to the jurisdiction allows the Court only to review the case based on the pleadings; that is, the Court may not consider evidence." 2.RR 81-82.

> alleged facts that affirmatively demonstrate the court's jurisdiction to hear the case. Our de novo review of such challenges looks to the pleader's intent and construes the pleadings in its favor.

Id. at 823; *see also S. California Sunbelt Devs., Inc. v. Grammer*, No. 03-19-00192-CV, 2019 WL 7342249, at *6 (Tex. App.—Austin Dec. 31, 2019, pet. denied) (in reviewing a ruling under Rule 91a, "[w]e construe pleadings liberally in favor of the plaintiff, look to the pleader's intent, and accept as true the factual allegations in the pleadings to determine whether the cause of action has a basis in law or fact").

In arguing that "the Court may also 'consider relevant evidence offered by the parties,'" OAG cites *Farmers Tex. Cty. Mut. Ins. Co. v. Beasley*, 598 S.W.3d 237, 240 (Tex. 2020). OAG Br. at 10. But *Beasley* is not a Rule 91a case. *Beasley* involved a plea to the jurisdiction challenging the element of standing. *Beasley*, 598 S.W.3d at 238 (Tex. 2020). The relevant statement in the Supreme Court's opinion is: "In applying a de novo standard of review to a standing determination, reviewing courts 'construe the pleadings in the plaintiff's favor, but we also consider relevant evidence offered by the parties.'" *Id*. at 240. Rather than "collecting cases" as OAG claims, the Court quoted and cited only *In re H.S.*, 550 S.W.3d 151, 155 (Tex. 2018), which is another standing case having nothing to do with Rule 91a. Both cases involve fact-based challenges to the standing element of jurisdiction, and neither stands for the unlikely proposition that an appellate court considers evidence when reviewing a ruling on which the trial-court is *prohibited* from considering it.

ARGUMENT

I. This case does not involve "allegations of hypothetical future violations."

OAG's lead argument sets the tone for a brief full of mischaracterization. It asserts that "Plaintiffs have not alleged a good-faith belief that a governmental entity or public employee violated a law" because "plaintiffs only reported that they expected laws might be violated, not that any law was actually violated." OAG Br. at 13. But OAG's attempt to support this assertion does not even discuss the *allegations* in Appellees' Petition.

A. Appellees alleged that they believed Ken Paxton and OAG had already committed crimes, not merely that they might commit future crimes.

A look at the Second Amended Petition—the Court's sole focus in a Rule 91a case—trounces OAG's argument. CR.377; *see supra* at 3-8. The pleading is packed with specific allegations that Appellees reported past and ongoing violations of the Texas Penal Code, including chapters 36 (bribery), 37 (perjury and falsification of government records), and 39 (abuse of office), and federal law, including 18 U.S.C. §1510(a) (obstruction of criminal investigations) and 18 U.S.C. §1512 (tampering with a witness, victim, or informant). For example, Appellees pled the following, along with factual detail backing each allegation:

- The three Plaintiffs who attended [the September 30, 2020 FBI] meeting made very clear that they believed Paxton's and OAG's conduct were acts of criminal bribery, tampering with government records, harassment, obstruction of justice, and abuse of office. CR.378.

- Over the course of 2019 and 2020, Ken Paxton used and abused his office by causing the full weight of the office that he commands, deploying employees and resources of OAG spanning multiple functions and departments, to improperly interfere in the civil disputes and criminal matters of his donor, friend and personal benefactor Nate Paul. CR.387.

- On or about September 29, Plaintiffs each learned that Paxton was causing OAG to use the grand jury process and the subpoenas obtained under false pretenses to investigate and intimidate Nate Paul's perceived financial adversaries. CR.402.

- As of September 30, 2020, because of the conduct of OAG and Paxton described above, each Plaintiff had a subjective and reasonable belief that Paxton and OAG misused the funds, services and personnel of his office to personally benefit Nate Paul and to benefit himself. CR.404.

- By September 30, 2020, each of the Plaintiffs had formed a good faith and reasonable belief that Paxton and OAG directed and participated in creating, presenting, and using false government records with knowledge of their falsity. CR.404-05.

- By September 30, 2020, with knowledge that Paul was a major donor to Paxton's campaign, and information that he was assisting in the remodeling of Paxton's residence, and employing Paxton's mistress, each Plaintiff formed a good faith and reasonable belief, based upon the conduct described above, that Paxton and OAG had been bribed. CR.405-06.

- By September 30, 2020, all of the Plaintiffs knew that Paxton and OAG were orchestrating a campaign to use the levers of power of OAG to investigate, harass and intimidate the federal law enforcement agents who were investigating and would likely testify in official proceedings about the search warrants on Paul's home and offices. In addition, each Plaintiff reasonably believed that Paxton was being bribed to orchestrate the harassment and witness intimidation. CR.406.

None of these allegations speculates about the future. Every one of them alleges that OAG and Paxton had already committed crimes when Appellees reported their concerns to the FBI on September 30, 2020. These allegations overwhelmingly

support the trial court's order and defeat OAG's contention that Appellees alleged only a possible, future violation.

B. OAG improperly cites to the partial evidentiary record from the truncated temporary injunction hearing.

Instead of discussing the relevant allegations in Appellees' pleading, OAG bases its argument solely on two statements by a non-party witness (Jeff Mateer) at the aborted hearing on Appellees' application for temporary injunction. OAG Br. at 14-15. The established constraints of Rule 91a make any evidence admitted during the TI hearing irrelevant to this appeal. *See supra* at 13-15. And simple logic dictates that what a non-party *says* cannot change what Appellees have *alleged* in their pleading.

Worse yet, OAG's portrayal of Mateer's testimony is entirely misleading. First, OAG says "Mateer's testimony confirms that he and his colleagues reported only speculation about what could happen if they took the course of action about which the Attorney General inquired." OAG Br. at 14 (citing 2.RR 180-81). Not only did Mateer say no such thing, but the cited portion of the TI record is not even *testimony*. Second, OAG claims that Mateer could not answer "yes" when asked whether he "c[a]me to believe that the Office of Attorney General was being engaged in ongoing criminal activity." OAG Br. at 14 (citing 2.RR 189-90). This claim distorts Mateer's testimony. In fact, Mateer testified unequivocally that he believed

at the time of Appellees' FBI report—and still believes today—that Paxton committed crimes, including abuse of office and bribery. 2.RR 153-55

1. OAG cites *argument* and calls it testimony.

Before the TI hearing commenced, counsel for OAG sent Mateer a letter demanding that he "refrain from any disclosure or use of any confidential or privileged information [he] received or had access to during [his] employment with the OAG." 3 RR, ex. 32 at 2. This letter—seemingly an attempt to intimidate a witness and obstruct justice—overtly threatened Mateer that "the OAG may utilize all legal means available to it to compel [his] compliance." *Id*. When asked about certain conversations with the Attorney General, Mateer referred to this threat and sought guidance from the trial court about what he could disclose. 2.RR 156.

A 27-page discussion ensued between the trial court and counsel for the parties about the extent to which any OAG privilege had been waived. 2.RR 156-82. During this discussion, no testimony was solicited, and the trial court advised Mateer:

> THE COURT: You are both a witness here, but I think I have to also allow you an opportunity to be your own lawyer here as well if you feel you need to assert an objection. Do you understand that?
>
> THE WITNESS: I understand.

2.RR 160. The Court later asked Mateer if "he wants to say anything *as a lawyer* here or if he wants to simply stay out of this and let the lawyers make argument." 2.RR 173 (emphasis added).

On the pages cited by OAG, Mateer asked and received permission to "***weigh in as an attorney, not the witness***." 2.RR 180 (emphasis added). Mateer then argued that, as First Assistant, he was authorized to waive any OAG privilege as to matters he and the Appellees reported to the FBI and that the crime-fraud exception covers any conversations he and the Appellees had about these matters. 2.RR 180-81. While arguing that the crime-fraud exception should defeat OAG's attempt to muzzle the whistleblowers, Mateer said the words quoted in OAG's brief. Mateer advocated that if Appellees and the other Deputies had gone along with Paxton's misconduct instead of reporting it to law enforcement, they would have been complicit in his crimes, thus satisfying the crime-fraud exception. That is, "I do believe that the deputies, had they gone down this path, would be put in a position to assist and/or cover up with what – what would -- would be a crime." 2.RR 181. OAG's characterization of this statement as testimony is simply false.

2. Mateer *testified* that he and Appellees reported ongoing and past crimes committed by Paxton and OAG.

As a witness, Matter testified unequivocally that when they went to the FBI on September 30, 2020, he and the Appellees "had a good-faith belief that the Attorney General was violating federal and/or state law, including prohibitions

relating to improper influence[, abuse] of office, bribery, and other potential criminal offenses." 2.RR 153. Mateer signed the October 1, 2020, letter informing OAG that they had reported this good faith belief to the FBI, and he testified that he still stands behind the facts set forth in the letter. 2.RR 153-55; 3 RR, ex. 4. This testimony is 100 percent consistent with and supportive of Appellees' claims.

Ignoring this testimony about what Appellees actually reported to the FBI, OAG focuses on a short series of questions about one specific interaction with Paul that took place many months before Mateer and the Appellees connected the dots. 2.RR 183-89. He was asked whether "anybody working and reporting to you express[ed] concerns about Nate Paul around this time *in June of 2020*?" 2.RR 189 (emphasis added). Over OAG's objection, Mateer said "yes." *Id*. Then he was asked: "And did you come to believe that the Office of Attorney General was being engaged in ongoing criminal activity in connection with Nate Paul?" *Id*. After another objection, Mateer gave the answer OAG quotes:

> And I know it called for yes or no, but it's a question that it's hard to give a yes or no, so that makes it difficult for me as -- as -- as the witness. What I would say is it -- it could have led to that. Certainly it's -- did I have concerns? I had potential concerns.

2.RR 190. Then Mateer clarified that the "concerns" he was speaking about related specifically to Paul "at that time." 2.RR 190.

OAG does not apprise the Court that this testimony was tied to the June 2020 time frame. Worse, OAG prunes the phrase "in connection with Nate Paul" to falsely suggest that Mateer was asked generally whether he ever "c[a]me to believe that the Office of Attorney General was being engaged in ongoing criminal activity." OAG Br. at 14. Although OAG thwarted Mateer's opportunity to explain his concerns about Paul during the June 2020 timeframe (2.RR 191), his October 1 letter and testimony about it conclusively establish that by the September 30, 2020 FBI report, his concerns had matured into a firm belief that "the Attorney General was violating federal and/or state law, including prohibitions relating to improper influence[, abuse] of office, bribery, and other potential criminal offenses." 2.RR 153.

Mateer's *testimony* as a witness unequivocally supports Appellees' allegations that they reported to the FBI past and ongoing crimes, not the mere possibility of future crimes. And Mateer's *argument* as a lawyer urges that Appellees' conversations about those crimes are not privileged because if they had gone along with the Attorney General's conduct, they would have been assisting him in ongoing crimes or covering up his past crimes. So even if the Court were to consider the record of the TI hearing in reviewing the Rule 91a ruling, the Court should summarily reject OAG's attempt to characterize Mateer's testimony as some

sort of conclusive admission that Appellees went to the FBI with no more than "speculation that a crime would occur, not an actual crime."[4]

II. Appellees have alleged violations of criminal law by *both* the employing governmental entity and another public employee.

Next, OAG boldly argues that the Attorney General is above the law. To state a claim under the Whistleblower Act, Appellees must allege that they in good faith reported a violation of law by *either* (i) "the employing governmental entity" or (ii) "another public employee." TEX. GOVT. CODE §554.002(a). OAG argues that Ken Paxton's conduct is *neither* conduct of the employing governmental entity (OAG) nor conduct of a public employee. OAG Br. 15-26. This is nonsense.

A. Criminal acts committed by the Attorney General in his official capacity are acts of the employing governmental entity.

The Whistleblower Act defines "state governmental entity," in relevant part, as "a board commission, department, office, or other agency in the executive branch of state government, created under the constitution or statute of the state…" TEX. GOVT. CODE §554.001(5)(A). OAG is indisputably a state agency in the executive branch of state government created by statute. *See* TEX. CONST. ART. IV, § 22 and TEX. GOVT. CODE § 402.001, *et seq*. And OAG was indisputably the employer of

[4] OAG took even greater license in its June 1, 2021, press release, predicting victory because its brief shows that Mateer "swore under oath that Paxton committed no actual crimes." *See* Appendix A (OAG Press Release). Given the impropriety of citing evidence in a Rule 91a appeal, and OAG's mischaracterization of what Mateer "swore under oath," perhaps this portion of OAG's brief was written for an audience other than the justices of this Court.

each Appellee until it fired them. CR.379-81. Accordingly, OAG meets the statutory definition of "employing governmental entity."

Texas courts have repeatedly held in Whistleblower Act cases that misconduct of an agency's high-ranking officials, when acting in their official capacity, is misconduct of "the employing governmental entity" they serve. TEX. GOVT. CODE §554.002(a). Indeed, one of the legislative purposes of the Whistleblower Act is to secure lawful conduct on the part of "***those who direct and conduct the affairs of public bodies***." *City of Cockrell Hill v. Johnson*, 48 S.W.3d 887, 896 (Tex. App.—Fort Worth 2001, pet. denied) (emphasis added).

The argument OAG advances here was squarely rejected in *Housing Authority of the City of El Paso v. Rangel*, 131 S.W.3d 542, 545 (Tex. App.—El Paso, 2004, rev'd & rem'd by agreement). In *Rangel*, the plaintiff was terminated from his position at the Housing Authority ("HACEP") after reporting the misconduct of two HACEP commissioners to law enforcement. Just as the powers of OAG are vested in the Attorney General, the court noted that "the powers of the authority are vested in the Board of Commissioners." *Id*. at 547. Just as Appellees are high-ranking OAG deputies, Rangel was a deputy executive director of HACEP. *Id*. at 545.

Rangel reported that Commissioner Licon failed to report an interest in an HACEP project. The court of appeals had no trouble concluding that this alleged misconduct related to the commissioner's official duties and therefore constituted an

unlawful act of HACEP: "Failure to disclose such an interest constitutes misconduct of office. Consequently, the conduct of Commissioner Licon clearly constitutes misfeasance in his official duties." *Id*. at 548 (citation omitted). Because Appellees likewise allege that Paxton committed misfeasance in his official duties, they have alleged unlawful conduct of OAG itself.

Rangel reported that the second commissioner, Lozana, misreported her income so she could personally gain access to subsidized housing. *Id*. HACEP argued that this misconduct was taken in Lozana's capacity as a housing tenant, not her capacity as a commissioner. The Court rejected this argument too, reasoning that attributing the misrepresentation to HACEP was supported by the legislative purpose of the Whistleblower Act:

> [T]he Whistleblower Act is directed at public employers' legal violations that are detrimental to the public good or society in general. . . . Lozano's actions in misstating her income were detrimental to society in general and would be the type of conduct the public would be concerned about if committed by an appointed commissioner of HACEP.

Rangel, 131 S.W.3d at 54.

Here, there can be no doubt that the public should be, and in fact is, concerned about an Attorney General who abused his office by causing the office he commands to improperly interfere in civil disputes and criminal matters to benefit his donor,

friend and personal benefactor.[5] CR.55–67. Paxton's betrayal of the public trust is amplified by the ironic fact that the public elected him to be the top law enforcement officer in the State. By comparison, the misconduct of the commissioners in *Rangel* seems almost trivial.

Further examples can be found in *Wichita County v. Hart* and *Tarrant County v. Bivins*, both holding that the reported misdeeds of a sheriff constituted acts of the county itself for purposes of the Whistleblower Act. *Wichita County v. Hart*, 892 S.W.2d 912, 929 (Tex. App.—Austin 1994) (rev'd on other grounds); *Tarrant County v. Bivins*, 936 S.W.2d 419, 422 (Tex. App.—Fort Worth 1996, no writ). *Hart* held that a "sheriff is part of the County's government when he is acting in his official capacity, and consequently the County is liable for his misdeeds," and *Bivins* agrees. *Hart*, 892 S.W.2d at 929; *Bivins*, 936 S.W.2d at 422.

Sheriffs, of course—like the Attorney General—are elected constitutional officials. TEX. CONST. ART. 5 § 23. Because the misconduct reported by Appellees was carried out with the imprimatur of Paxton's office as Attorney General, for purposes of the Whistleblower Act, his actions were also the actions of OAG itself. *C.f. City of Cockrell Hill*, 48 S.W.3d at 895 (explaining that a city alderman's

[5] *E.g.*, Jake Bleiberg, *AP Sources: FBI Is Investigating Texas Attorney General*, AP NEWS, Nov. 17, 2020, https://apnews.com/article/ken-paxton-austin-texas-crime-f8413d14842d848e69cf81bb4d2e87e2 (last visited June 21, 2021).

conduct would constitute conduct of the "employing governmental entity" if it had been taken in the alderman's official capacity).

Without distinguishing these authorities, OAG seeks to dodge their logic by reaching outside the realm of the Whistleblower Act for the proposition that unlawful acts of government officials are not the acts of the State. OAG Br. at 18. OAG cites to inapposite cases addressing whether sovereign immunity bars suit for equitable relief when an individual official has violated statutory or constitutional provisions. *Patel v. Tex. Dep't of Licensing*, 469 S.W.3d 69 (Tex. 2015); *City of El Paso v. Heinrich*, 284 S.W.3d 366 (Tex. 2009).

This argument fails because OAG's attempt to invoke sovereign immunity in this case is not governed by the common-law principles governing *ultra vires* litigation, but instead by the Legislature's express waiver of immunity in the Whistleblower Act. TEX. GOV'T CODE § 554.0035. OAG makes no effort to answer the impossible question: why would the Legislature have waived immunity for claims based on reporting unlawful conduct "of the employing governmental entity" if employing governmental entities were legally incapable of engaging in unlawful conduct? This Court should summarily reject OAG's unprecedented invitation to disregard the statutory standard governing immunity under the Whistleblower Act and render the plain language meaningless.

Along similar lines, OAG makes a throwaway argument that an individual's misconduct cannot be attributable to the employing governmental entity because to do so would mean that "the terms 'governmental entity' and 'public employee' no longer operate distinctly." OAG Br. at 19. Under this argument, Appellees could plead illegal conduct by their employer only if they could articulate how the *agency itself* satisfied every element of a particular crime. This is obviously an impossibility, since virtually every crime requires a mental state, and an inanimate entity cannot possess such a thing separate from the mental states of its human representatives. Thus, the Legislature could never have intended the phrase "violation of law by the employing governmental entity" to be interpreted in such a wooden manner. Additionally, even if the employing governmental entity itself is implicated by the official acts of any of its officials, "violation of law by . . . another public employee" retains meaning by protecting whistleblowers who report criminal conduct by someone at a *separate* governmental entity.

The Texas Legislature drafted the Whistleblower Act broadly to protect individuals who report unlawful conduct by "by the employing governmental entity or another public employee." The Act thus functions to root out government corruption whether it is the isolated behavior of a non-policy-making employee or the entity's official policy set by its highest-ranking officers. The Court should reject

OAG's backwards suggestion that intentional misconduct by the Attorney General is not attributable to the entity he currently runs.

Finally, OAG's argument ignores the fact that Paxton enlisted multiple arms of OAG to further his unlawful goals; thus, this was not only a report of conduct by Paxton himself. Paxton could not, and did not, carry out his criminal scheme alone. Appellees have pleaded facts, supported by exhibits, showing that Paxton involved various departments and functions of OAG in the criminal scheme, and that Appellees reported these acts of OAG to law enforcement. CR.387, 389-402; 447-462; 467-469; 503. Thus, Appellees have clearly alleged that Paxton co-opted the OAG as a whole to do his corrupt bidding.

B. Appellees reported a good-faith belief that OAG was engaged in criminal activity, not mere failure to comply with policies or norms.

OAG incorrectly argues that Appellees have not alleged *unlawful* conduct by the entity because they pled only OAG's failure to comply with internal policies and norms. OAG Br. at 15-16. This argument ignores the operative pleading and the nature of the crimes Appellees reported. Allegations of bribery or abuse of office necessarily involve conduct that could facially seem lawful, but for corrupt motivation. For example, awarding a construction contract is a run-of-the-mill official act. But if the contract is awarded in exchange for something of value, it transforms to bribery. Similarly, giving someone a promotion can be perfectly fine, or it can be sexual harassment if it were conditioned on coerced sexual conduct.

OAG's argument focuses only on the "quid" and asks the Court to ignore the "pro quo" alleged throughout the Second Amended Petition. For example, OAG says Appellees have alleged merely that "Paxton ordered OAG to (1) release information plaintiffs thought should have been retained based on '[l]ongstanding OAG precedent and sound principles indicated.'" OAG Br. at 15 (quoting CR.390). Even if this were a fair characterization of the detailed factual allegations in this section of the Second Amended Petition (which it is not, *see* CR.388-91), OAG fails to mention Appellees' allegations that Paxton had an illicit motive to release the information. CR.90-91.

Every allegation that OAG (mis)summarizes as mere "deviation from internal norms" is accompanied by specific allegations that Ken Paxton directed OAG resources in this manner for the illegal purpose of conferring benefits on an individual with whom Paxton shared many beneficial personal relationships. CR.388-403. Appellees specifically laid out how their detailed factual allegations met the elements of numerous specific state and federal crimes. CR.403-06. OAG's argument here is thus meritless and asks the Court to disregard its duty to construe the pleadings in the light most favorable to Appellees. TEX. R. CIV. P. 91a.1.

Equally vacuous is OAG's one-paragraph suggestion that Appellees have not alleged crimes by the employing governmental entity because they did not allege that every single person carrying out Ken Paxton's unlawful orders acted with

criminal intent. OAG Br. at 16-17. As set forth above, Appellees' allegations that Paxton committed crimes in his official capacity as Attorney General are sufficient to allege criminal activity by the employing governmental entity.

C. The Attorney General is a public employee.

One of the Whistleblower Act's remedial purposes is to secure lawful conduct by "those who direct and conduct the affairs of public bodies." *See City of Cockrell Hill*, 48 S.W.3d at 896. The taxpayers of Texas pay Ken Paxton an annual salary of $153,750 plus employee health and retirement benefits to direct the affairs of a public body. CR.381-82, 445-46. Although the Court need not reach this issue, it should also reject OAG's arguments that Paxton is not an employee of the agency he directs and that a report to law enforcement involving job-related criminal conduct by Paxton himself—or any other city, county or state elected official for that matter—does not trigger the protections of the Act. OAG Br. at 19-26.

1. Ken Paxton is an OAG employee in the plain and ordinary meaning of the term.

The Act defines "public employee" as "an employee or appointed officer other than an independent contractor who is paid to perform services for a state or local governmental entity." TEX. GOVT. CODE §554.001(4). While "employee" is used in this definition, the term itself is not defined in the Act. Therefore, the Court must give the word "employee" its plain and ordinary meaning. *See, e.g., Hogan v. Zoanni*, No. 18-0944, 2021 WL 2273721 at *5 (Tex. June 4, 2021) ("When a term

is left undefined in a statute, 'we will use the plain and ordinary meaning of the term and interpret it within the context of the statute."') (quoting *EBS Sols., Inc. v. Hegar*, 601 S.W.3d 744, 758 (Tex. 2020)). "To ascertain this plain and ordinary meaning, we start with dictionaries and 'then consider the term's usage in other statutes, court decisions, and similar authorities.'" *EBS Sols., Inc. v. Hegar*, 601 S.W.3d at 758 (quoting *Tex. State Bd. of Exam'rs of Marriage & Family Therapists v. Tex. Med. Ass'n*, 511 S.W.3d 28, 35 (Tex. 2017)).

The dictionary defines an employee as "someone who is paid to work for someone else." Cambridge English Dictionary (https://dictionary.cambridge.org/us/dictionary/english/employee (last visited June 21, 2021)). Under these plain terms, Ken Paxton is an employee of the State as that word is commonly understood.

OAG's own employment records show that OAG correctly considered Paxton to fit within the plain and ordinary meaning of the term "employee." As alleged in Appellees' Second Amended Petition, OAG's own employment records:

- State that Paxton's "Date of Employment" with OAG was January 5, 2015. CR.381, 445-46.
- State that the "Employee Being Replaced" by Paxton in 2015 is Greg Abbott, who was the Attorney General prior to Paxton. CR.381, 446.
- Catalog Paxton's "Employee Information." CR.381, 446.
- List Paxton's Position Number. CR.381, 446.

- State that, since September 1, 2015 to the present, Paxton, has been paid a salary of at least $153,750 per year by OAG for his full-time, 40-hour per week employment at OAG. CR.382, 445-46.

- State that during that same time period, Paxton is an employee in a specific OAG-designated "pay group" and "Job Class Title." CR.382, 445-46.

- Show that, when Paxton receives a salary increase for his job at OAG, his salary increase is recorded, like it is for other employees, in a "Personnel Action Form." CR.382, 445-46.

As Plaintiffs further plead, since January 5, 2015, Paxton has been contributing to and accruing employment-based service credit under an employee pension plan administered by the Employees Retirement System of Texas. CR.382. That Paxton is an OAG employee in the plain and ordinary meaning of that term is further borne out by how OAG treats individuals who work at OAG in a *non-employee* capacity. When OAG compensates individuals or companies on a non-employee basis, it expressly identifies them as a non-employee in OAG records. CR.382-83, 447-62. But OAG does not identify Paxton that way in OAG's personnel file. CR.445-46.

OAG's actions and employee records—if not its lawyers' arguments in this case—tell the story. OAG presents no convincing reason why this Court should treat Paxton any differently in this lawsuit than OAG treats him in real life—as an employee in the plain and ordinary meaning of the word.

2. Texas courts consider elected officials "employees" under the Act.

Texas courts interpreting the Texas Whistleblower Act have treated elected officials as employees under the Act. *See, e.g., City of Donna v. Ramirez*, 548 S.W.3d 26, 38-39 (Tex. App.—Corpus Christi, 2017, pet. denied) (applying the Whistleblower Act to an employee who claimed to have reported violations of law by "one or more publicly elected [city] officials" prior to his termination); *City of Cockrell Hill*, 48 S.W.3d at 894 (Tex. App.—Fort Worth 2001, pet. denied) (assuming that the Act can apply to elected officials but concluding that it did not apply to an *unpaid* elected official).

3. The Texas Constitution and statutes demonstrate that elected officials are employees of the State.

Other provisions of Texas law further contradict OAG's claim that elected officials cannot also be state employees. For example, the Texas Constitution contemplates that even the Governor is "employed" by the state. *See* TEXAS CONST. ART. IV § 17(b) and (c) (providing that, when either the Lieutenant Governor or the President pro tempore of the Senate are exercising the duties of the Governor, they will "receive in like manner the same compensation which the Governor would have received had the Governor been ***employed*** in the duties of that office") (emphasis added).

The Texas Workers' Compensation Act defines "employee" to include a person who is "in the service of the state pursuant to an election, appointment, or express oral or written contract of hire." TEX. LABOR CODE 501.001(5). Thus, Paxton is eligible to receive workers' compensation benefits because he is an employee of the state. TEX. LABOR CODE 501.021.

As another example, Texas Government Code Chapter 660, which deals with travel and expense reimbursement while on state business, defines the term "state employee" to include a "key official" and "chief administrator," which includes elected officials. TEX. GOV'T CODE §660.002 (4), (13), (20). The statute illustrates that categories of individuals can be overlapping; an elected official can also be an employee. *See* TEX. GOV'T CODE §660.071.

4. OAG's contention is repugnant to the purposes of the Act.

In its Rule 91a Motion, OAG argued repeatedly that Ken Paxton is entitled to unfettered "loyalty" from those who work for OAG. CR.196, 204, 207, 209. In its brief, OAG gives voice to Paxton's demand for loyalty by arguing that employee reports to law enforcement about the criminal conduct of an elected official should not be covered by the Whistleblower Act because Paxton is "accountable to no one other than the voters for his conduct." OAG Br. at 22. Of course, in the very next sentence OAG acknowledges that the Texas Constitution gives the Texas Legislature power to investigate, censure, impeach, and even remove an elected official. *Id*.

The Whistleblower Act is intended in part to ensure that the voters and the Legislature learn of public corruption precisely so they, along with law enforcement, can hold criminals in places of public trust accountable. As this Court has stated:

> The State of Texas elevates public employees who report legal wrongdoing to a protected status as a matter of fundamental policy. The State views whistleblowing by a public employee as a courageous act of ***loyalty to the larger community***, and we allow whistleblowing public employees to be made whole through lawsuits against the State.

Tex. Dep't of Assistive & Rehabilitative Servs. v. Howard, 182 S.W.3d 393, 396 (Tex. App.—Austin 2005, pet. denied) (emphasis added); s*ee also Bell Cnty. v. Kozeny*, No. 10-14-00021-CV, 2014 WL 4792656, at *3 n.3 (Tex. App.—Waco Sept. 25, 2014, no pet.)(mem. op.)(same).

The Whistleblower Act is "designed to enhance openness in government and compel the employing governmental entity's compliance with law," *County of El Paso v. Latimer*, 431 S.W.3d 844, 848 (Tex. App.—El Paso 2014, no pet.) (quoting *Tex. Dep't of Assistive & Rehabilitative Servs. v. Howard*, 182 S.W.3d at 399, (internal brackets omitted), and to "encourage disclosure of governmental malfeasance and corruption." *City of Waco v. Lopez*, 259 S.W.3d 147, 154 (Tex. 2008). But OAG advocates for precisely the opposite. The Legislature and Texas voters could never hold an elected official accountable for criminal conduct if the official is entitled to demand total loyalty and silence from those he employs.

5. When legislatures intend to exclude elected officials from the term "employee," they do so expressly.

OAG's argument is founded on the false premise that an individual must be either an employee or an elected official, but not both. However, the existence of an employer/employee relationship does not render a simultaneously existing other kind of relationship between the same parties void. *Bridges v. Andrews Transp.*, 88 S.W.3d 801, 805 (Tex. App.—Beaumont 2002, no pet.); *see also* TEXAS CONST., ART. IV § 17(b) and (c) and TEX. GOV'T CODE §660.002 (4), (13), (20).

When legislative bodies in other contexts intend to *exclude* a category of individuals from the definition of "employee," they usually do so expressly. For example, in the Fair Labor Standards Act, Congress defines "employee" as "any individual employed by an employer." 29 U.S.C. §203(e)(1). The FLSA defines "employ" as "to suffer or permit to work." 29 U.S.C. §203(g). It then expressly excludes categories of individuals from coverage under the defined term "employee," including elected officials who do not have state civil service protection. 29 U.S.C. §203(e)(2)(C). But of course there is no such express exclusion in the Texas Whistleblower Act.

Other employment statutes are similarly explicit when they express an intention to exclude elected officials from the definition of "employee." For example, the Texas Commission on Human Rights Act ("TCHRA") expressly

carves out certain types of officials from the definition of "employee."[6] *See* TEX. LABOR CODE § 21.002 ("'employee' means an individual employed by an employer, including an individual subject to the civil service laws of this state or a political subdivision of this state, except that the term does not include an individual elected to public office in this state or a political subdivision of this state").

Likewise, laws concerning financial disclosure or Texas's Public Integrity Unit discussed in OAG's brief expressly *exclude* "officers" from the definition of "employee," suggesting that, absent their explicit exclusion, officers would fall within the definition of "employee." *See, e.g.*, TEX. GOV'T CODE § 572.002 (financial disclosure laws) and § 411.0251 (Public Integrity Unit) (both defining "state employee" as "an individual, ***other than a state officer***, who is employed by" various government bodies (emphasis added)).

By contrast, some Texas statutes expressly *include* "officers" within the definition of certain types of employees. *See, e.g.,* TEX. GOV'T CODE § 666.001(4) ("state employee" includes "officers"); § 606.061 ("'state employee' includes an

[6] Title VII of the 1964 Civil Rights Act likewise expressly excludes officers from the definition of employee. ("Title VII defines an employee as "an individual employed by an employer," with four exceptions: (1) an official elected by qualified voters; (2) a person chosen by an elected officer to be on the officer's personal staff; (3) an appointee on the policy making level; and (4) an "immediate adviser with respect to the exercise of the constitutional or legal powers of the office." *Lloyd v. Birkman*, 127 F. Supp. 3d 725, 750 (W.D. Tex. 2015) (citing 42 U.S.C § 2000e(f)).

elected or appointed officer…"); TEX. CIV. PRAC. & REM. CODE § 101.001 (Tort Claims Act) ("'[e]mployee' means a person, including an officer or agent").

Because some Texas statutes expressly *exclude* "officers" from the definition of "employee," while others expressly *include* "officers," the Court should not look to other statutory schemes to find a reason to treat Paxton as a non-employee of the office he directs. Rather, the Court should give dispositive weight to (i) Appellees' clear pleading that Paxton is an OAG employee; (ii) the broad remedial purposes of the Whistleblower Act; and (iii) the undisputed fact that OAG itself considers Paxton to be an employee.

6. The cases OAG cites do not support declaring Paxton a non-employee of OAG.

In Section I.B.3 of its Brief, OAG repeatedly insists that Paxton cannot be an "employee" in the ordinary meaning of that term because he ***is the sovereign***. Setting aside that this argument contradicts OAG's argument that Paxton's acts are not the acts of the agency itself, it is also wrong on the issue of whether Paxton is an employee in the ordinary meaning of that term.

OAG does not cite a single case—because there is none—holding what OAG asks this Court to declare: that a report to law enforcement of criminal misconduct falls outside the scope of the Texas Whistleblower Act if an elected official participated in the crime. Neither the statute nor any case law even remotely supports that contention.

The cases OAG cites in section I.B.3 interpret other statutes in fundamentally different contexts. In *Green v. Stewart*, 516 S.W.2d 133, 136 (Tex. 1974), the Supreme Court held that a county tax assessor *is an employee* for purposes of the Civil Service Act.[7] OAG fails to explain how a holding that an individual *is* an employee under one statute aids in determining a different individual is not an employee under another statute.

Similarly, the courts in *Aldine Independent School Dist. v. Standley,* 280 S.W.2d 578, 579 (Tex. 1955); *Krier v. Navarro*, 952 S.W.2d 25, 28 (Tex. App.—San Antonio 1997, pet. denied); and *Arredondo v. State*, 406 S.W.3d 300, 303-04 (Tex. App.—San Antonio 2013, pet. ref'd) did not address at all whether an individual met a statutory or ordinary meaning definition of "employee." Rather, in those cases the holding turned on whether an individual was an "official" or an "officer," not whether the individual was or was not also an "employee."

The only case cited in section I.B.3 of OAG's brief that holds an individual to be an "employee" arose under a different statute with a different purpose and with an altogether different statutory architecture. In *Thompson v. City of Austin*, 979

[7] The Civil Service Act has a different statutory definition than the Whistleblower Act. It defines "employee" as "any person who obtains his position by appointment and who is not authorized by statute to perform governmental functions in his own right involving some exercise of discretion but does not include a holder of an office the term of which is limited by the Constitution of the State of Texas."

S.W.2d 676, 682 (Tex. App.—Austin 1998, no pet.) this Court held that municipal court judges were not "employees" under the Texas Commission on Human Rights Act. OAG offers no justification for importing the interpretation of a statutory term from another statute, especially given, as discussed above, the markedly different statutory language and purpose of the TCHRA compared with the Whistleblower Act. In particular, the definition of "employee" under the TCHRA only determines who is eligible for protection under the TCHRA. Whereas the inclusion of the broad term "employee" in the definition of "public employee" under the Texas Whistleblower Act governs not only who is eligible for protection under the Act, but also whose conduct can form the basis of a protected report to law enforcement. Thus, not only are these two terms used differently in two different statutes with two different purposes, a finding that a person is an "employee" has dramatically different import under the two statutes.

III. Appellees have alleged the other elements of their claims.

In section I C of its brief, OAG takes three more shots at Appellees' Second Amended Petition, arguing that: (1) the pleading fails to sufficiently plead the factual basis of a good-faith reporting of unlawful conduct; (2) because of Appellees' special training as attorneys and a law enforcement professional, their beliefs were speculative; and (3) the pleading does not sufficiently identify the specific "unique" facts provided by each whistleblower to the proper law enforcement authorities.

OAG Br. at 26-36. These arguments go far beyond a fair reading of the Second Amended Petition and ask the Court to predetermine what the evidence may show at trial.

Even in a fact-based jurisdictional challenge—which this is not—Appellees would not be required to "prove [their] claim in order to satisfy the jurisdictional hurdle." *Texas Health and Human Services Commission v. Pope,* 03-19-00368-CV, 2020 WL 6750565, *6 (Tex. App.—Austin Nov. 18, 2020, pet. filed), citing *State v. Lueck*, 290 S.W.3d 876, 884 (Tex. 2009). "The purpose of a dilatory plea is not to force the plaintiffs to preview their case on the merits but to establish a reason why the merits of the plaintiffs' claims should never be reached." *Pope,* 2020 WL 6750565 at *6 quoting *Bland I.S.D. v. Blue*, 34 S.W.3d 547, 554 (Tex. 2000)). A plea to the jurisdiction "does not authorize an inquiry so far into the substance of the claims presented that [Appellees] are required to put on their case simply to establish jurisdiction." *Id.* Additionally, no specific form for reporting the suspected unlawful conduct is required. *See Howard*, 182 S.W.3d at 397 (affirming jury verdict in case arising from oral reporting to the State Auditor's Office).

A. Appellees reported conduct constituting multiple crimes.

OAG's brief implies that the Whistleblower Act requires a civil plaintiff to plead all details that would be contained in an indictment or other charging document. *See* OAG Br. at 28-31. The law simply does not require that. As this

Court reiterated last year, there is no requirement that an employee identify a specific law, or use "specific phrasing," so long as there is "some law prohibiting the complained-of conduct to give rise to a whistleblower claim." *Pope,* 2020 WL 6750565 at *19 (citations omitted). In fact, a plaintiff may maintain a Whistleblower Act claim even without establishing "an actual violation of law." *Id.*, quoting *City of Elsa v. Gonzalez*, 325 S.W.3d 622, 627 n.3 (Tex. 2010); *id*. at *22 ("Again, however, the Whistleblower Act does not require an actual violation of law but a good-faith belief that a violation of law has occurred.").

"The Act requires only a good-faith belief that a violation of law has occurred." *Id.* "Good faith" "means that (1) the employee believed that the conduct reported was a violation of law and (2) the employee's belief was reasonable in light of the employee's training and experience." *Hart*, 917 S.W.2d at 784. This Court has written that "when an employee believes and reports in good faith that a violation has occurred, but is wrong about the legal effect of the facts, he is nevertheless protected by the whistleblower statute." *Texas Dept. of Criminal Justice v. McElyea*, 239 S.W.3d 842, 850 (Tex. App.—Austin 2007, pet. denied).

Appellees' pleading easily clears the bar. It identifies the specific statutes that Appellees contend OAG and Paxton violated and the basis for the good-faith belief that these violations occurred. See CR.404-06 (citing numerous statutes).

In addition to pleading the specific laws that Appellees believed in good faith OAG and Paxton violated, the Second Amended Petition incorporates in paragraphs 95-97 a summary of the conversations with the proper law enforcement authorities and the detailed factual basis for their beliefs which are contained in a lengthy, detailed recitation in paragraphs 17-92. CR.407-08; CR.384-406. Appellees did not "fail to identify the specific content of any report" and the Petition is not "too vague to raise a viable claim that plaintiffs reported an actual violation of law to federal authorities" as the OAG argues. *See* OAG Br. at 28-31.

B. Each plaintiff reported this conduct to an appropriate law enforcement authority.

Appellees' live pleading expressly identifies that all four Appellees complained to appropriate law enforcement authorities, providing extensive factual information about considerable wrongdoing. Brickman, Penley, and Vassar reported the unlawful conduct to the FBI on September 30, 2020. CR.406-08. Maxwell reported the unlawful conduct to the Texas Rangers/DPS on September 30, 2020, and subsequently to the FBI, and the Travis County District Attorney's Office. CR.408, 409.[8] *See Mata v. Harris County*, 14–11–00446–CV, 2012 WL 2312707,

[8] OAG's Brief suggests that reporting the violations of law within OAG are (ironically) not reporting a violation of law to a "proper law enforcement authority." That is likely incorrect. *See e.g., Raymondville I.S.D. v. Ruiz,* 13-19-00597-CV, 2021 WL 822699, *3 (Tex. App.—Corpus Christi March 4, 2021, pet. filed) (Raymondville ISD Police Department qualifies as an "appropriate law enforcement authority" under the Texas Whistleblower Act "because it had the authority to investigate the violation of criminal law alleged."). Regardless, Appellees here do not rely on the complaints and reports to OAG itself because they reported the complaints of unlawful

*8-9 (Tex. App.—Houston [14th Dist.] June 19, 2012, no pet.) ("Harris County does not contend Mata failed to allege that…the FBI was an appropriate law enforcement authority."); *Hennsley v. Stevens,* 613 S.W.3d 296 (Tex. App.—Amarillo 2020, no pet.) ("Hennsley reported the conduct to various law enforcement officials, including the Lubbock County Sheriff, Lubbock County District Attorney, a deputy sheriff, and two Texas Rangers…We [] hold[] that Hennsley satisfied this pleading element when he identified the numerous law enforcement officials to whom he reported Stevens's alleged witness tampering.").

Appellees are not only distinguished public servants, but they are also professionally trained at law enforcement and/or as attorneys. CR.379-81, 409-10. This Court has considered whistleblowers' backgrounds and professional experience in the face of a plea to the jurisdiction and a summary judgment motion. *Pope,* 2020 WL 6750565 at *7 ("In light of Pope's and Pickett's extensive experience and knowledge regarding MTP, there is at least a fact issue as to whether they had a good-faith belief that HHSC had violated the law.").

OAG tries cynically to turn this on its head by suggesting that because Appellees are so well-versed in violations of law somehow their civil pleading should read like a charging instrument, but the Whistleblower Act and the cases

conduct to the FBI, the Texas Rangers, and the Travis County District Attorney's Office. Their report internally to OAG's Human Resources satisfied any administrative reporting requirement.

interpreting it simply do not require this. OAG also suggests that Appellees indicated that they speculated about a violation of law. *See* OAG Br. at 31. As addressed, this is a gross mischaracterization of Appellees' Second Amended Petition. *See supra at* 19-20. Construing the Second Amended Petition in Appellees' favor, taking the facts plead as true, and giving effect to their intent shows that Appellees' extensive training and experience is exactly what enabled them to put the pieces together and conclude that crimes had been committed:

> Since at least August of 2020, Maxwell has had a continuous subjective belief that the conduct of Ken Paxton and the OAG that he reported ***violated the law*** based on his decades in law enforcement and having been Ken Paxton's hand-picked top law enforcement officer in Texas. Maxwell has been a licensed peace officer since April of 1973 (nearly 48 years). Maxwell has decades of experience investigating, analyzing, and charging criminal conduct including decades of investigating public corruption. Maxwell has worked with the public integrity branch of the DPS. In addition to being subjectively made in good faith, his beliefs are also objectively reasonable and in good faith. These beliefs are not only deeply rooted in his vast law enforcement experience but objectively supported by a plain reading of the laws at issue, ***as well as by the similar conclusion reached and publicly expressed by seven (7) other high-level employees of the OAG who are all licensed and respected attorneys***.").

CR.410 (emphasis added). *See* TEX. R. CIV. P. 91a.1; *see also Montgomery County v. Park*, 246 S.W.3d 610, 615 (Tex. 2007).

Unlike *Hennsley* (*see* OAG Br. at 28-29), where the plaintiff alleged facts disproving a necessary element of witness tampering, Appellees' Second Amended

Petition is replete with facts showing the basis for their good-faith belief that OAG violated multiple state and federal laws and no facts that show that their claims are barred. OAG's false claims that Appellees were "disloyal" or merely disagreed with policy issues, as opposed to complaining that OAG and Paxton were involved in illegal, criminal, corrupt, and unlawful conduct, are, at best, potential fact disputes, not grounds for dismissal. As in *McElyea*, the jury here will be in the best position to judge the facts and should be "free to disbelieve that explanation and believe that Moriarty's characterization of McElyea as 'disloyal' was a result of McElyea's reports." *McElyea*, 239 S.W.3d at 856 n. 12.

OAG's final argument in Section I C suggests the pleading does not sufficiently identify the specific "unique" facts provided by each whistleblower to the proper law enforcement authorities or that some aspects of the criminal conduct may have been publicly known. This argument appears to confuse the requirements of the Federal False Claims Act (31 U.S.C. § 3730 et. seq.) with the Texas Whistleblower Act. *See* OAG Br. at 32-36. Unlike the FCA, nothing in the Whistleblower Act requires the law-enforcement report to be based solely on "secret" or "private information," and nothing prohibits more than one public employee from complaining in good faith about their jointly held belief of unlawful conduct.

Not only is there no support for OAG's "unique" information argument (which likely explains why OAG does not cite or even mis-cite a case for this notion), but other cases show the exact opposite. *See Bates v. Randall County*, 297 S.W.3d 828, 831-32 (Tex. App.—Amarillo 2009, pet. denied) (more than one whistleblower); *City of New Braunfels v. Allen*, 132 S.W.3d 157, 159-60 (Tex. App—Austin 2004, no pet.) (same); and *Dinger v. Smith County, Texas*, No. 12–16–00101–CV, 2016 WL 6427868 (Tex. App.—Tyler Oct. 31, 2016, no pet.) (same). Often, exposing corruption by powerful public figures to benefit the public interest requires more than one person complaining about the unlawful conduct. This lines up directly with the purposes of the Texas Whistleblower Act which are "to (1) protect public employees from retaliation by their employer when, in good faith, they report a violation of law, and (2) secure lawful conduct by those who direct and conduct the affairs of government." *Allen*, 132 S.W.3d at 161; *Rogers v. City of Fort Worth* 89 S.W.3d 265, 274 (Tex. App.—Fort Worth, 2002, no pet.) (*citing Upton County v. Brown*, 960 S.W.2d 808, 817 (Tex. App.—El Paso 1997, no pet.) and *Bivins*, 936 S.W.2d at 421).

With respect to Appellee Maxwell, the OAG again misstates the record and ignores the detailed allegations of the Second Amended Petition. CR.408-10. Maxwell did not "merely later repeat[] the report the other three plaintiffs claim to have made" on "some unspecified date." *See* OAG Br. at 36. The Petition is clear

that: "Plaintiff Maxwell reported the unlawful conduct ***to Randy Prince, Deputy Director Law Enforcement Operations of the Texas Rangers, on September 30, 2020***." CR.409 (emphasis added). "Ranger Prince is a person with direct ability to initiate the investigation or prosecution of the laws that Maxwell reported had been violated." CR.409. Maxwell also made the same good-faith reports to the FBI and Department of Justice, and the Travis County District Attorney's Office. CR.409.

Under the established standards governing this appeal, Appellees' Second Amended Petition easily withstands all of OAG's attacks. The Court should affirm the trial court's order denying OAG's Rule 91a motion.

IV. OAG's constitutional concerns and separation-of-powers arguments are baseless attempts to make this case seem more complex than it is.

In the final section of its brief, OAG desperately argues that Appellees' claims do not fit within the plain language of the sovereign immunity waiver found in the Whistleblower Act because the protection of the Act does not extend to suits by "high-level appointees of a [sic] elected constitutional officer" and any "expansion" of the Act to reach such suits "would therefore have serious separation-of-powers implications." OAG Br. at 38.

But Appellees' suit does not require "extension" or "expansion" of the Whistleblower Act as OAG contends. Quite to the contrary, Appellees' allegations fit squarely within its elements. The statute plainly protects "public employees" who engage in whistleblowing. TEX. GOV'T. CODE §554.002(a); 554.001(4). Nothing in

the statute exempts "high-level appointees of an elected constitutional officer" or otherwise excludes any specific type of public employee from its protection.

In fact, OAG has lost similar arguments in the past. *See, e.g., Office of Atty. Gen. v. Murillo*, No. 13-05-598-CV, 2006 WL 3759716, at *2 (Tex. App.—Corpus Christi Dec. 21, 2006, no pet.) (rejecting OAG's argument that the whistleblower Act does not extend to "supervisors" because the statute "does not distinguish between public employees who assume a supervisory role and those who do not"). Instead, accepting OAG's arguments would require this Court to read exceptions into the Act that are not present and contrary to its purpose, and to create unprecedented restrictions to its application.

A. OAG does not advance a viable constitutional challenge to the Whistleblower Act.

As an initial matter, OAG's vague constitutional references do not advance a cognizable constitutional challenge to the Whistleblower Act. First, OAG did not plead any constitutional challenge in its Original Answer (CR.45), did not indicate that this appeal involved the constitutionality of a statute in its docketing statement, and did not include its "constitutional concerns" in the issues presented on appeal.

Second, "a separation of powers challenge is a ***challenge to the facial constitutionality***[9] of a statute, not an as applied challenge." *Texas Dept. of Family & Protective Services v. Dickensheets*, 274 S.W.3d 150, 155 (Tex. App.—Houston [1st Dist.] 2008, no pet.) *citing, Reyes v. State*, 753 S.W.2d 382, 383 (Tex. Crim. App. 1988) (emphasis added). But OAG's argument—that the Whistleblower Act violates the doctrine of separation of powers when it is relied upon by "high-level appointees" who report criminal conduct of an elected constitutional officer—is an invalid argument that the statute is unconstitutional as applied to this scenario, not that the Act always operates unconstitutionally.[10] In fact, OAG acknowledges that "the Whistleblower Act has long protected line-level employees." OAG Br. at 39. OAG cites no authority for an "as applied" constitutional challenge based on separation of powers.

Moreover, the Attorney General's job is to defend the constitutionality of Texas statutes, not attack them. The Government Code requires a litigant who challenges the constitutionality of a Texas statute to serve the Attorney General with notice and a copy of the pleading that raises such challenge. TEX. GOVT. Code §

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[9] *See Tex. Workers' Comp. Comm'n v. Garcia*, 893 S.W.2d 504, 518 n. 16 (Tex. 1995) (Parties may challenge the constitutionality of a statute by contending that the statute is facially invalid or is invalid as applied to that party).

[10] To prevail on a facial invalidity challenge, the complaining party must establish that the statute, by its terms, always operates unconstitutionally. *City of Corpus Christi v. Public Utility Comm'n*, 51 S.W.3d 231, 240-41 (Tex. 2001) citing *Barshop v. Medina County Underground Water Conservation Dist.*, 925 S.W.2d 618, 627 (Tex. 1996).

402.010. The purpose of this requirement is to provide the Attorney General the opportunity to intervene and defend the constitutionality of the statute at issue.

Instead, in this instance, the official charged with defending the constitutionality of the laws of Texas stands accused of violating our laws, and the agency he runs argues it would be unconstitutional to apply our laws to him. For all of these reasons, this Court should summarily reject any OAG attempt to challenge the constitutionality of the Whistleblower Act. At best, OAG's argument is either (a) one for the judicial creation of a policymaker exception to the Whistleblower Act; or (b) one of statutory construction. Regardless, both arguments lack support and merit.

B. There is no policymaker exception to the Whistleblower Act and the Act does not violate separation of powers.

Although this Court takes the allegations in Plaintiffs' Second Amended Petition as true, *Koenig*, 497 S.W.3d at 599, OAG inappropriately and inaccurately posits that it terminated the Appellees' employment because they "disagreed with certain legal positions," there was a "decline of the trust relationship," and because Ken Paxton "lost confidence" in the Appellees. OAG Br. at xii, 4-5, 39. Not only do Appellees' allegations defeat this claim, but OAG retaliated so swiftly that Appellees are entitled to a statutory presumption that OAG terminated them because of their reports to law enforcement. *See* TEX. GOVT. CODE § 554.004(a).

OAG disregards Appellees' actual pleading and relies on these "alternative facts" in an attempt to extend policymaker and patronage dismissal doctrines to violations of the Whistleblower Act. But nothing in the Second Amended Petition remotely suggests that OAG terminated Appellees over policy disagreements or political differences as happened in the inapposite cases relied upon by OAG. Instead, it is presumed, and for purposes of this appeal taken as true, that OAG terminated Appellees because they reported the illegal conduct of Ken Paxton and the OAG to law enforcement, as alleged in explicit detail in the pleading.

OAG relies heavily on federal cases examining the President of the United States' appointment authority. But the appointment authority of even the highest executive in the federal government is not absolute, and the separation of powers principle does not "grant the President an absolute authority to remove any and all Executive Branch officials at will." *Free Enterprise Fund v. Public Co. Accounting Oversight Bd.*, 561 U.S. 477 (2010) (emphasis omitted). OAG concedes that it is "an undisputed legal truism" that Congress has the power, in some circumstances, to limit the President's power to remove an officer from his post. OAG Br. at 40.

Likewise, the Texas Legislature has the power to limit an executive officer's power to terminate state employees for certain reasons or, more specifically, to provide a cause of action and remedies to public employees who are terminated in retaliation for actions the Legislature deems worthy of protection. Just as the

Attorney General could not lawfully terminate a "high-ranking" employee "because of race, color, disability, religion, sex, national origin," TEX. LABOR CODE § 21.051, the Legislature has ample authority to limit his ability to terminate those who report his unlawful conduct. Indeed, there is significant dissonance between circumstances in which the judiciary recognizes the authority of state officials to choose their own political appointees and advisors and those circumstances where the Legislature has seen fit to limit that authority out of public concern.

The Whistleblower Act fosters compliance with federal and state law. It does nothing to hamper an elected official's ability to terminate senior-level employees for policy disagreements or political patronage. It simply prohibits retaliating against an employee who in good faith reports criminal conduct on the part of the official or agency. In *Garcetti v. Ceballos*, 547 U.S. 410 (2006), the United States Supreme Court recognized this obvious difference. In holding that government employees are not entitled to protection for certain speech that is part of their job, the Court nonetheless observed that "[e]xposing governmental inefficiency and misconduct is a matter of considerable significance;" that "[t]he dictates of sound judgment are reinforced by the powerful network of legislative enactments—such as whistle-blower protection laws…;" and that "[t]hese imperatives, as well as obligations arising from any other applicable constitutional provisions and mandates

of the criminal and civil laws, protect employees and provide checks on supervisors who would order unlawful or otherwise inappropriate actions." *Id.* at 425-26.

There is no authority for OAG's argument, and it cannot be fairly characterized as a good faith effort to modify or extend existing law. The Act applies to claims by senior staff against agency heads. To hold otherwise would be to completely undermine the purpose of the statute and to read words into the Act that are simply not there. *See Hogan v. Zoanni*, No. 18-0944, 2021 WL 2273721 at *4 (Tex. June 4, 2021) (courts presume the Legislature chose statutory language deliberately and purposefully and that it likewise excluded language deliberately and purposefully). As the Supreme Court recently reiterated: "the Legislature does not hide elephants in mouseholes." *Hogan*, 2021 WL 2273721 at *19.

C. Analysis of the Whistleblower Act supports a waiver of sovereign immunity in this case.

"In enacting a statute, it is presumed that: (1) compliance with the constitutions of this state and the United States is intended; (2) the entire statute is intended to be effective; (3) a just and reasonable result is intended; (4) a result feasible of execution is intended; and (5) public interest is favored over any private interest." TEX. GOVT. CODE §311.021. The Court's goal in construing statutes is to "ascertain and give effect to the Legislature's intent as expressed by the language of the statute." *Houston Municipal Employees Pension System*, 549 S.W.3d 566, 580

(Tex. 2018) (quoting *McIntyre v. El Paso Indep. Sch. Dist.*, 499 S.W.3d 820, 834 (Tex. 2016)). As the Texas Supreme Court has held for decades:

> The fundamental rule controlling the construction of a statute is to ascertain the intention of the Legislature expressed therein. That intention should be ascertained from the entire act, and not from isolated portions thereof. This Court has repeatedly held that the intention of the Legislature in enacting a law is the law itself; and hence the aim and object of construction is to ascertain and enforce the legislative intent, and not to defeat, nullify, or thwart it. . . It is settled that the intention of the Legislature controls the language used in an act, and in construing such act the court is not necessarily confined to the literal meaning of the words used therein, and the intent rather than the strict letter of the act will control.

City of Mason v. West Texas Utilities Co., 150 Tex. 18, 237 S.W.2d 273, 278 (1951).

In construing a statute, a court may consider the object sought to be attained and the consequences of a particular construction. *See* TEX. GOVT. CODE § 311.023(1) and (5). "When interpreting terms in a statute, [the] context necessarily includes the Legislature's codified purpose." *Hogan*, 2021 WL 2273721 at *10. Courts should avoid constructions that are "antithetical to the statute's stated purpose." *Hogan*, 2021 WL 2273721 at *4. Implying additional conditions not "apparent from the statute's text…serves only to undermine the statute's expressly stated purpose." *Hogan*, 2021 WL 2273721 at *8. Deriving the Legislature's intent and the statute's meaning results from reviewing the statute as a whole. *Hogan*, 2021 WL 2273721 at *4.

"The purposes of the Texas Whistleblower Act are to (1) protect public employees from retaliation by their employer when, in good faith, they report a violation of law, and (2) secure lawful conduct by ***those who direct and conduct the affairs of government***." *Allen*, 132 S.W.3d at 161 (emphasis added). Other courts have noted that the Act's purposes are (1) to enhance openness in government by protecting public employees who inform proper authorities of legal violations and (2) to secure governmental compliance with the law on the part of ***those who direct and conduct governmental affairs***." *See Rogers*, 89 S.W.3d at 275 (*citing Brown*, 960 S.W.2d at 817 and *Bivins*, 936 S.W.2d at 421) (emphasis added).

OAG asks the Court to actively undermine the second purpose. Without any statutory or case law support and in direct contradiction of the statute's plain language, OAG asks the Court to conclude that senior officials whose position would afford them the most knowledge of criminal wrongdoing by an agency and who are in the best position to report corruption, cannot bring claims for retaliation they suffer after reporting public corruption by "those who direct and conduct the affairs of" the agency. But the purpose of the Act is to enhance openness in government and compel government's compliance with the law by protecting those who report wrongdoing. *Hill v. Burnet County Sheriff's Dep't*, 96 S.W.3d 436, 440 (Tex. App.—Austin 2002, no pet.). *C.f., Hogan*, 2021 WL 2273721 at *8 (requiring

dismissal when the statute provides for abatement would "undermine the statute's expressly stated purpose").

OAG attempts to use cases in which courts have discussed governmental officials' right to terminate employees in certain situations or, ironically, cases where courts have found a violation of employee's constitutional rights when an employer took adverse action, to support an argument that the Attorney General can terminate an employee for disloyalty or "disagreeing with his policies."[11] But reporting the Attorney General's *criminal* behavior is not disloyalty, and reporting *illegal* "policies" is not mere professional disagreement. Agreeing with OAG would not give effect to the Legislature's intent. It would rob the Texas Whistleblower Act of its most vital functions: protecting public employees who inform proper authorities of legal violations and securing governmental compliance with the law on the part of those who direct and conduct governmental affairs.

[11] OAG relies on the same cases it mistakenly relied on at the trial court. For a detailed discussion of why these cases are not applicable authority or persuasive, please see Section D of Plaintiffs' Response to OAG's Rule 91a Motion, incorporated here by reference. CR.357-64.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

As required by Texas Rule of Appellate Produce 9.4(i)(3), I certify that this Brief on the Merits contains 14,790 words, excluding the parts of the brief exempted by Rule 9.4(i)(1).

/s/ Joseph R. Knight
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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of this Brief has been served upon the following via electronic mail on the 21st day of June 2021.

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Appendix A

June 02, 2021 | Press Release

OAG Files Appellate Brief: Former Top Aides Say One Thing Under Oath, Another in Public; Can't Squeeze Back Into Agency After Failing on the Job

Yesterday the Office of the Attorney General of Texas (OAG) filed an appellate brief with the Austin-based 3rd Court of Appeals fully debunking a group of former OAG political appointees who had gone rogue and lodged unfounded accusations against Attorney General Paxton. The appeal arises out of a Travis County District Court's erroneous denial of OAG's plea to the jurisdiction. OAG's appellate brief argues that the group of former appointees have no right under Texas law to force their way back into the Agency after failing in the basic duties and responsibilities of their jobs.

Most importantly, the brief reveals a total contradiction between what the rogue appointees have alleged in public and what they've said under oath. Notably, Jeff Mateer—Attorney General Paxton's former number-two executive—swore under oath that Paxton committed no actual crimes. Rather, Mateer only "had potential concerns," adding without elaboration or specificity that there might be issues if they had gone down a certain "path." But bare allegations of hypothetical future

problems aren't enough to blow the proverbial whistle. When asked whether Mateer "c[a]me to believe that the Office of Attorney General was being engaged in ongoing criminal activity," Mateer was unable "to give a yes or no. . . . What [he] would say is it—it could have led to that." However, speculation about or unfounded fears over what might happen—especially when any doubts could have been alleviated by asking a few questions—isn't enough under Texas law, and certainly isn't enough to justify what these former aides did.

> "As I said when this unfortunate drama first broke, the seven political appointees who launched an unsubstantiated smear campaign against me were rogue," said Attorney General Paxton. "They disagreed with me on certain matters, which, of course, is fine. Indeed, I always encourage robust debate and discussion among my senior staff. But rather than asking clarifying questions seeking to understand my decision-making, they sought to depose me, cooking up false allegations and trying to attack me in the court of public opinion. They have failed in the their desperate bid. They'll lose in court too, and my Office will take these claims as far as necessary to ensure Texas law is upheld."

Read the appellant's brief here (https://www.texasattorneygeneral.gov/sites/default/files/images/executive-management/2021/Brickman%203d%20Ct%20Op.%20BOM%20_%20Final%20AS%20FILED.pd

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